

ORIGINAL

(S E R V E D)
(September 4, 2003)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

September 4, 2003

DOCKET NO. 03-01

HUAL AS

v.

PUERTO RICO PORTS AUTHORITY

COMPLAINT DISMISSED; SETTLEMENT APPROVED

The parties have filed a motion asking that the complaint be dismissed with prejudice and that a settlement agreement in which they have entered be approved. If the motion is granted, this proceeding as well as a related court proceeding would terminate amicably and the need for further discovery and expensive litigation would be obviated. The parties were assisted in reaching settlement by two Commission mediators, Mr. Ronald D. Murphy and Mr. Allen E Jackson, operating under the Commission's alternative dispute resolution (ADR) program pursuant to 46 C.F.R. 502.401 et seq. (Subpart Q-Alternative Dispute Resolution). The parties are to be

commended for ending their dispute in this way. As explained below, I find that their settlement fully comports with the strong policy in the law and in Commission proceedings favoring settlements in view of their many benefits, including cost savings both to the Commission and to the parties. Accordingly, their motion is granted. A brief discussion of the history of this case will place the matter in perspective and illustrate the parties' good sense in seeking and achieving settlement.

The case began in January 2003 when complainant HUAL AS (HUAL), a Norwegian vessel-operating common carrier calling at San Juan, Puerto Rico, filed a complaint, alleging that respondent Puerto Rico Ports Authority (PRPA), a public corporation operating the port of San Juan, Puerto Rico under the laws of the Commonwealth of Puerto Rico, was violating sections 1 O(d)(1) and 10(d)(4) of the Shipping Act of 1984 because, allegedly, PRPA was improperly charging wharfage on automobiles carried by HUAL to San Juan for transshipment to foreign ports under a higher rate published in PRPA's tariff¹ and was also improperly charging such automobiles on outbound as well as inbound shipments contrary to PRPA's tariff, which HUAL also alleged to be vague and ambiguous. HUAL alleged that PRPA had thus failed to establish reasonable practices in violation of section 1 O(d)(1) of the Act and that HUAL was unduly or unreasonably prejudiced and disadvantaged, in violation of section 10(d)(4) of the Act. HUAL asked for a cease and desist order and for unspecified monetary reparations. In addition, respondent PRPA had filed suit against HUAL's agent in Puerto Rico, Puerto Rico Line, Inc., claiming unpaid charges, which suit was

¹PRPA, which is a marine terminal operator, publishes its rates, regulations and practices under what the law now calls "schedules" in place of their previous designation as "tariffs." See section 8(f) of the 1984 Act, 46 U.S.C. app. sec. 1707(f); 46 C.F.R. 525.1(c)(17). However, PRPA's document at issue is known as "Tariff M-1-5," and the parties have commonly used the term "Tariff" to refer to the document in this proceeding. The "Tariff" went into effect on November 1, 1999, and is expected to be superseded by a successor "tariff" within the next six months.

transferred to U.S. District Court in Puerto Rico. This court suit was stayed by the court to allow the Commission to determine Shipping Act issues that were common to both proceedings.

The proceeding underwent some delay when PRPA obtained permission to file an answer beyond the time specified by the rules in order to give PRPA's counsel time to consult with officials and to examine documents written in Spanish that were located in Puerto Rico. Furthermore, PRPA wished to consider whether PRPA might be exempt under the 11th Amendment to the U.S. Constitution and other matters. Instead of an answer to the complaint, however, PRPA filed a motion to dismiss on technical grounds having to do with a defective verification in the complaint and failure of HUAL to state whether HUAL had consulted with the Commission's ADR specialist prior to filing the complaint. The motion was denied. Thereafter PRPA filed its answer to the complaint denying the allegations and raising numerous affirmative defenses. The parties then engaged in discovery and produced numerous documents related to the matters in Issue. However, the parties had earlier recognized that their dispute was suitable for mediation and during the discovery process they entered into mediation discussions with the two Commission mediators identified above. On July 3, 2003, the parties reached agreement on key points of a settlement and, following negotiations regarding specific terms, executed their settlement agreement, which was ratified by PRPA's Board of Directors on August 25, 2003.

General Description of the Settlement Agreement

The parties have attached the full text of their Settlement Agreement to their Joint Motion for Approval of Confidential Settlement Agreement and Dismissal with Prejudice. They have asked

that the Agreement be kept confidential and that the complaint be dismissed with prejudice. In previous cases requests to keep settlement agreements confidential have been granted and the settlements have been approved. See *Crowley Liner Services, Inc. and Trailer Bridge, Inc v. Puerto Rico Ports Authority*, 29 S.R.R. 971, 973 n. 2 (2002), and cases cited therein. The full terms of the Settlement Agreement are available for the Commission to examine, although they otherwise will be held confidential pursuant to 46 C.F.R. 502.119.

Without disclosing particulars so that the Agreement's confidentiality may be protected, I note that HUAL has agreed to make a lump-sum payment to PRPA, which has been done, and to make payments to PRPA under certain terms until the current PRPA tariff, which HUAL had claimed to be ambiguous, is superseded. In return, PRPA has granted permission for HUAL to operate on a credit basis at San Juan. The Agreement includes provisions designed to facilitate the parties' commercial relationship and preclude further dispute. It also includes limited confidentiality provisions intended to protect the confidential commercial information and interests of the parties. Disclosure is permitted to governmental or Judicial authorities and, under certain conditions, to agents of the parties. The confidentiality provisions survive termination of the Agreement for a period of two years following such termination. The foregoing is a brief description of the essential terms of the Agreement. The following provides a further brief description of the Agreement for the reader's convenience. Of course, the Commission is free to examine the complete text of the Agreement which will be held in the Commission's confidential files.

The Agreement is 13 pages long and comprises a preamble and ten numbered paragraphs with subdivisions. The preamble explains the background to the dispute and the filing of the instant complaint and the complaint in the court in Puerto Rico that PRPA brought against HUAL's agent.

It explains how the parties were encouraged to settle and to seek the assistance of the Commission's mediators and why the parties believe that their Agreement must be kept confidential and that the parties have agreed upon a method for computing a monetary settlement reflecting the compromise of amounts alleged to be due and owing between the parties. It explains that the Agreement will not become effective without approval by the Commission. It explains how HUAL will make payments to PRPA for certain alleged unpaid wharfage charges at a certain rate published in PRPA's Tariff and provides for HUAL's continued transshipment operations at San Juan and for the possibility that HUAL might discontinue such operations. In return PRPA agrees to restore HUAL's credit privileges and to meet with HUAL's representatives to negotiate the terms and conditions of HUAL's future presence at San Juan. Neither party admits to violations of law and they mutually agree to release each other from liability arising out of the disputed matters and to seek dismissal of the two complaints before the Commission and the court in Puerto Rico. Each party agrees to absorb its own costs and attorney's fees. Furthermore, each party reserves the right to contest any relevant rate item in PRPA's future tariff subject to certain limitations.

Approvability of the Settlement Agreement

The parties have persuasively shown that their Settlement Agreement is consistent with the Commission's frequently expressed approval of settlements. As the parties correctly assert (Motion at 4):

The Commission has a strong and consistent policy of "encouraging settlements and engaging in every presumption which favors a finding that they are fair, correct, and valid." *Inlet Fish Producers, Inc. v Sea-Land Service, Inc.*, 29 S.R.R. 975, 978

(2002), quoting from *Old Ben Coal Co v. Sea-Land Service, Inc* , 21 F.M.C 506, 512, 18 S.R.R. 108.5 (ALJ 1978); accord, *Crowley Liner Services, Inc. and Traler Bridge, Inc. v. Puerto Rico Ports Authority*, 29 S.R.R. 971,973 (ALJ, FMC, May 3 1, 2002) (the law and Commission policy encourage settlements and presume them to be fair, correct and valid, particularly where the parties may reach an amicable resolution in lieu of costly litigation; . . . *Puerto Rico Shipping Association v Puerto Rico Ports Authority*, 27 S.R.R. 645,647 (ALJ, FMC, Apr. 2.5, 1996) (approving a settlement agreement that serves the policy of enforcing tariffs, terminates litigation before the Commission and in other forums, and facilitates the proper development of future tariffs).

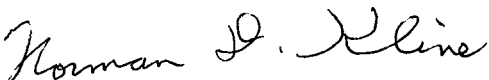
Because there are now so many cases in which the Commission has approved settlement agreements among litigating parties, it is unnecessary to belabor the reasons why they are encouraged and approved. As the Commission has stated in *Old Ben Coal Company v. Sea-Land Service, Inc* . cited above, 21 F.M.C. at 513:

If a proffered settlement does not appear to violate any law or policy and is free of fraud, duress, undue influence, mistake or other defects which might make it unapprovable despite the strong policy of the law encouraging approval of settlements, the settlement will probably pass muster and receive approval.

The parties have explained in their Motion, citing the Administrative Procedure Act (APA), favoring settlements when “time, the nature of the proceeding, and the public interest permit” (5 U.S.C. sec. 554(b)(3)), that their settlement is the result of weeks of negotiations of their free will (with the assistance of the Commission’s mediators) and that without the settlement this case would have to proceed with expensive rounds of depositions in Puerto Rico and Washington, D C.. with some witnesses coming from Norway. In addition, the parties would be forced to incur significant costs in production and translation of a substantial number of documents, many of which are in Spanish or Norwegian. They explain that the compromise of their competing claims

reflects reasonable business decisions that are routinely approved by the Commission. In this judge's opinion, it would not be proper to deny the parties the prompt benefits of their negotiated settlement. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 89-90 (1981) (judges should not prevent parties from realizing the benefits of their settlement agreement which does not violate law and was freely negotiated).

For the foregoing reasons, the subject Settlement Agreement should be and hereby is approved and the complaint is dismissed with prejudice, as requested by the parties.


Norman D. Kline
Administrative Law Judge